LEE HOOI LIAN

v.

KUAY GUAN KAI

HIGH COURT, SINGAPORE
CHAO HICK TIN JC
[SUIT NO. 1395 OF 1988]
28 FEBRUARY 1990

CONTRACT: *Options - Nature of - Whether party can sue to claim back option money before exercising his rights under the option - Anticipatory breach of contract - Remedies.*

The defendant granted an option to the plaintiff to purchase a piece of property. One of the terms of the said option was that the subsequent sale and purchase shall be subject to the property being free from any road-lines. The plaintiff paid a sum of $5,000 to the defendant for the option. It was a term of the option that the plaintiff was to pay to the defendant a sum representing 10% of the purchase price of the property at the time the plaintiff exercised his rights under the option less the said sum of $5,000 and that in the event that the property shall be subject to any road-line the plaintiff would be entitled to a refund of all sums paid.

Before the expiry of the time granted to the plaintiff to exercise the option, the plaintiff found out that the property was subject of a road-line. The plaintiff's solicitors then wrote to the defendants's solicitors informing them of this and requested for the refund of the $5,000. The defendant's solicitors replied stating that as the plaintiff had not exercised the option, the option sum of $5,000 was forfeited; alternatively that there was no basis for the refund of the $5,000 as there was no sale and purchase agreement which could only come about upon the plaintiff exercising the said option. The plaintiff contended that as the plaintiff was not willing to waive the condition of the road-line and as the defendant was unable to convey a road-line free property, the plaintiff was entitled to rescind the option or to accept the defendant's inability as an anticipatory breach on the defendant's part.

The plaintiff had filed this claim in the Subordinate Courts and had filed for summary judgment which application was dismissed. The plaintiff had applied to the High Court for leave to appeal. The Judge however decided to hear the same as an appeal.

Held:

[1] Under general contract law there cannot be any doubt that an innocent party may rely on an anticipatory breach on the part of the other and treat himself as having been discharged from the performance of the contract and sue for damages - an inability to perform need not be due to a deliberate act on the part of the wrongdoing party. So long as the inability existed it is no defence for that party to say that he is willing but is unable to perform.

[2] An option given for valuable consideration is a contract.

[3] The defendant here cannot convey the property which he had agreed to sell and the plaintiff is not prepared to waive the road-line free requirement. This situation is no different from the one where the defendant had made it impossible for himself to fulfill his obligations.

[4] It would be stretching technicality to absurdity if the plaintiff had to exercise the option and pay the balance 10% and with the next breath to request a refund of all sums paid.

[5] The refund of the $5,000 in the circumstances should have been an implied term of the option agreement.

[6] On the facts it would be grossly unjust to allow the defendant to retain the sum of $5,000.

[Appeal allowed.]

Cases referred to:
European Asian Bank v. Punjab and Sind Bank [1983] 2 All ER 508
Universal Cargo Carriers Corporation v. Citati [1957] 2 QB 401
United Dominous v. Eagle Aircraft Services [1968] 1 All ER 104
Fullington v. Penn Phillips Co. [1964] 395 Pac Rep (2 Ed) 124
McFerran v. Heroux 44 Wash 2d 631
Tatum v. Levi 117 CA 83, 3 P 2d 963
Unatin 7-Up Co. v. Anna Solomon 157 ALR 1304
Renol Holding v. Lankenau 116 NYS 2d 861
West Country Cleaners (Falmouth) Ltd. v. Saly [1966] 3 All ER 210
Sievwright v. Cromwell Proprietary Gold-Mining Co. [1901] 20 NZLR 487

Others sources referred to:
Chitty on Contracts, (25th Edn.), para. 1604
Barnsley on Land Options, (1st Edn.), p. 11
Corbin on Contracts, p. 907, 592
James on Option Contracts, p. 504, 1104

For the plaintiff - Roderick Martin
For the defendant - Lee Mun Hooi

JUDGMENT

Chao Hick Tin JC:

On 8 July 1987, in consideration of a sum of $5,000 (option sum), the defendant granted an option to the plaintiff to purchase the property at No 36, Jalan Jintan, Singapore 0922 (the property) for a sum of $425,000 and on the terms set out therein. The option was to be exercised by the plaintiff by signing on the option and delivering the same together with a cheque for $37,500 (representing 10% of the purchase price less the option sum) to the vendor's solicitors by 4p.m. on 21 July 1987.

Among the terms set out in the option is Clause 7 which reads as follows:

> 7. The sale and purchase herein shall be subject to the purchaser's solicitors receiving satisfactory replies to their legal requisitions and applications for Interpretation Plans to the various Government Departments and Mass Rapid Transit Corporation (MRTC) insofar as such replies/Interpretation Plans relate to the property and if any such replies and/or Interpretation Plans are found to be unsatisfactory or **if the property is affected or** may be affected **to any extent whatsoever by** the Mass Rapid Transit System, **any road line**, any drainage line, or any road or drainage proposal or Government acquisition or scheme or intended Government acquisition or scheme then this agreement may be rescinded at the purchaser's option and in such event the vendor shall forthwith refund to the purchaser all monies paid by the purchaser to the vendor or the vendor's solicitors but without any interest compensation or deductions whatsoever and thereupon neither party shall then have any claim or demand against the other for costs damages or compensation or otherwise ...
> (Emphasis added.)

On 21 July 1987, at 2.30 p.m. and well before the hour at which the option was due to expire, the solicitors for the plaintiff wrote to the solicitors for the defendant informing the latter, after referring to Clause 7, that they have "ascertained that the said property is affected by road-line and that in the circumstances (their) client is not in a position to exercise the said

option." They enclosed a copy of the Road Interpretation Plan. The solicitors for the plaintiff also asked for the refund of the $5,000 as soon as possible.

On 22 July 1987, the solicitors for the defendant replied to say that as the plaintiff did not exercise the option dated 8 July 1987 the option sum of $5,000 was forfeited. The defendant contended that until a contract had come into being by the plaintiff exercising the option, there was no basis for the plaintiff to claim the refund of the option sum. In rejoinder, the solicitors for the plaintiff stated that as the defendant was unable to perform the contract in the sense of conveying a roadline free property, and as the plaintiff was not prepared to waive this condition, the plaintiff was entitled either to rescind the option or to accept the defendant's inability to convey such a property as anticipatory breach on the latter's part.

This matter came before me by way of an appeal from the decision of the Deputy Registrar of the Subordinate Court who granted unconditional leave to the defendant to defend the action on the ground mainly that there is a point of law to be tried. As the facts are not in dispute and as the point is clearly one of law and adopting the reasoning propounded by Goff LJ in *European Asian Bank v. Punjab and Sind Bank* [1983] 2 All ER 508 at 516, I felt that I should decide the matter rather than grant the defendant leave to defend.

Let me say at the outset that under general contract law there cannot be any doubt that an innocent party may rely on an anticipatory breach on the part of the other and treat himself as having been discharged from the performance of the contract and sue for damages. This is clearly set out in *Chitty on Contracts* (25th Edn.), at para. 1604:

> If, before the time arrives at which a party is bound to perform a contract, he expresses an intention to break it, or acts in such a way as to lead a reasonable person to the conclusion that he does not intend to fulfil his part, this constitutes an 'anticipatory breach' of the contract and entitles the other party to take one of two courses. He may 'accept' the renunciation, treat it as discharging him from further performance and, sue for damages forthwith, or he may wait till the time for performance arrives and then sue.

and at para. 1612 the author states:

> Anticipatory breach of contract may be constituted by impossibility as well as by renunciation and similar principles apply to both.

An inability to perform need not be due to a deliberate act on the part of the wrongdoing party. So long as the inability existed it is no defence for that party to say that he is willing but is unable to perform: see *Universal Cargo Carriers Corporation v. Citati* [1957] 2 QB 401 at 437.

However, as I understand it, the contention of the defendant is a narrow one. The defendant does not dispute those general principles of contract law as set out in *Chitty*. What he is saying is that until the option has been exercised, and the contract to purchase has come into being, the plaintiff is not entitled to rely on any of the clauses set out in the option, which will only form the terms of the contract when the option is exercised. The defendant does not dispute that if the plaintiff had exercised the option, he would be entitled to a refund of the option sum.

It is clear beyond doubt that an option supported by consideration is a contract: see *United Dominous v. Eagle Aircraft Services* [l968] 1 All ER 104 at 109 per Diplock LJ. Its creation is governed by ordinary contractual principles. But it is a unilateral kind of contract which as explained by Diplock LJ:

> does not give rise to any immediate obligation on the part of either party to do or to refrain from doing anything except possibly an obligation on the part of the promisor to refrain from putting it out of his power to perform his undertaking in the future ... it will only do so on the occurrence of the event specified in the contract, *viz*., the doing (or refraining from doing) by the promisee of a particular thing.

Barnsley on Land Options (1st Edn.) describes the nature of such an option in these terms (p. 11):

> The grant of an enforceable option to purchase land confers on the granted a right to require the grantor to convey the land to him, subject to his compliance with the terms of the option. It is a kind of unilateral contract, which imposes on the grantor an obligation to enter into the 'main' or 'primary' contract with the grantee on the occurrence of the event specified in the unilateral contract, coupled with a promise (usually implied) to refrain from putting it out of his power to perform the obligation in the future. The option creates no obligations on the grantee's part; it gives him a right to demand performance of the grantor's obligation.

There appears to be a paucity of English or Singapore authorities on the issue now before me, i.e., whether the plaintiff must first exercise the option before he may rely on Clause 7 therein to claim the refund of the option sum. However, Counsel for the plaintiff have cited to me a number of useful American decisions which have addressed this issue. I propose to refer to several of them. First is the case *Fullington v. Penn Phillips Co.* [1964] 395 Pac Rep (2nd Edn.), 124. This was a case where a tenant had a three year lease of land with an option to purchase. Some seven months later the owner repudiated the lease including the option to purchase and requested the tenant to vacate the premises. Two months later, the tenant brought an action to recover damages based on the difference between the option price and the market price of the property. At the trial the owner objected to the admission of evidence of the market value of the land on the ground that the tenant was not entitled to damages without proof that he had elected to exercise the option to purchase. The trial Court held that since the tenant had not exercised the option to purchase there was no breach of contract and, therefore, there was no damage. On appeal, the Supreme Court of the State of Oregon, by a majority of 5-2, held that the tenant was entitled to recover damages upon breach of the option contract. The State Supreme Court explained their ruling as follows:

> We recognised that the rule we have adopted may permit the recovery of damages even though the option holder might not have exercised his option within the period and, therefore, would not have been damaged. Having repudiated the option contract and created this element of speculation, the option giver should not be permitted to deprive the option holder of damages on the ground that they are speculative ... Support for our position can be found by analogy in the cases holding that upon a taking by condemnation the option holder is entitled to compensation for his option interest where the property is taken prior to the exercise of the option.

It is of interest to note that the minority Judges in *Fullington* thought that it would be more equitable to treat the interest created by the option as a separate interest. They felt that it did not follow that because the owner/lessor terminated or attempted to terminate the lease wrongfully, the option should be deemed terminated also. They elaborated as follows:

> This is not a case in which the lessor has put it beyond his power to perform. There is nothing in the record to show that the lessor will not be able to honour the option when and if the plaintiff elects to exercise it.

In an earlier case *McFerran v. Heroux* 44 Wash 2nd 631 the Supreme Court of the State of Washington had the occasion to deal with a similar question. That was an action by a landlord against the tenants and the tenants' assignee for damages resulting from their failure to

rebuild a destroyed grandstand as required by the lease under which the plaintiff had an option to buy the grandstand at termination of lease. The Court there expressed the view that:

> It is true that plaintiff does not presently have a contract of purchase. But to infer that until an option has been exercised, the optionee has no rights of any kind capable of being enforced is to ignore the contractual nature of the option itself.

On the facts there the Court held that as a consequence of the defendants' breach, the subject matter of the option did not even exist. The Court felt that it was difficult to imagine any reason for requiring the "idle and useless act of electing" as a condition for bringing the action. In coming to this conclusion the Court relied on the opinion of two learned authors which I propose to set out as I think they are instructive. *Corbin on Contracts* 907, 272 states:

> As has heretofore been stated, the holder of an option to buy land has a conditional right to a conveyance, a power to turn that right into an unconditional right to immediate conveyance by performing the conditions, an immunity from revocation by the option giver, and the legal privilege of performing or not performing the conditions at his option. During the agreed term of his option, **he has a right that the option giver shall not repudiate or make performance impossible or more difficult** by conveying the land to a third person. **These rights are enforceable by all the usual judicial remedies, including judicial remedies, including judgment for damages,** injunction, and decree for specific performance. It is beyond question that those who have bought and paid for an option on the land believe that they have something on which they can rely; ...
> (Emphasis added.)

In *James on Option Contracts* 504, 1104, the author states:

> ... it would seem the breach of an option contract to keep the offer open during the stipulated time does not differ in principle from the breach of any other contract, and that, therefore, if during the time limit, the optionor breaches, as by selling the property to a third person under circumstances showing a repudiation of the option, **the idle and useless act of electing is not necessary to entitle the optionee to sue and recover damages for such breach, if an action is brought,** or if, as in the *Guilford* case, some act is done by the optionee, **before the expiration of the option time limit, to show his intention to enforce the option.** (Emphasis added.)

In *Tatum v. Levi* 117 CA 83, 3 P 2d 963, the defendant (Levi) granted an option to one Zinkand to purchase certain property. Zinkand paid a sum of US$5,000 for the option. This option was subsequently assigned to the plaintiff, Tatum. However, some months prior to the grant of this option the defendant had entered into a contract to sell the same property to a third party, which contract the defendant thought had lapsed due to the default of the third party. But shortly after Levi granted the option to Zinkand, the third party commenced an action against Levi and obtained a *lis pendens* against the property. Tatum sued Levi for specific performance and, alternatively, for damages. By an amendment, Tatum also claimed for the refund of the option money of US$5,000. Prior to the institution of the action, neither Tatum nor his assignors made any tender of performance under the option or gave notice of cancellation thereof to Levi. For these reasons, Levi contended that Tatum could not maintain the action. The Supreme Court of the State of California, after noting that during the period of the option and for an indefinite time thereafter, Levi could not, on account of the claims of the third party, deliver a marketable title to the property, declared that:

> Under such circumstances, tender of performance or notice of recision on the part of the plaintiff, would have been an idle act and was unnecessary. In fact, it is a general rule, where, under the terms of an unexecuted option agreement to sell real estate, the time has arrived for performance on the part of the vendor, and he is unable to perform as required by the option, the optionee or his assignee may bring suit to recover the deposit thereon, without tendering performance or rescinding the contract.

I ought to add that the State Supreme Court in *Tatum v. Levi* decided against the plaintiff, Tatum, apparently because the option did expressly provide that if the 3rd party should make any claim to or establish any right to the property, Levi should have the right to terminate the option held by Tatum upon returning to the optionee the amount paid by him; it also provided that Levi would defend and determine any claim made by the 3rd party as speedily as possible. The Court held that Levi did in fact defend the action as speedily as possible and therefore he did not breach any of the terms of the option.

In *Burks v. Davies* 85 Cal 110, 24 p. 613 it was contended that the grantee of an option could not recover the money for the option unless the grantee proved that the defendant failed to convey after demand and tender of the purchase money. This argument was rejected by the Californian Supreme Court, which was of the opinion that the grantee need not have to go through "the useless trouble of tendering payment and calling on (the grantor) to convey. Equally similar views were expressed by the Pennsylvania Supreme Court in *Unatin 7-Up Co. v. Anna Solomon* 157 ALR 130A where the Court held that where a defendant had unconditionally repudiated her obligation under an option, she waived the necessity of a tender. It said, "the law, which is eminently practical, does not require the doing of a vain thing."

The final American case which I would like to touch on is *Renol Holding v. Lankenau* 116 NYS 2d 861. There L, in consideration of a sum of US$2,000 paid to them, did on 19 April 1990 execute and deliver to R an option to purchase certain premises. The option was to be exercised before noon of 19 August 1950 by the payment of an additional sum of US$2,000 on account of the price (making a total down payment of US$4,000) and by the execution and delivery by R of a written contract in the form attached to the option. The parties met before the appointed time and R tendered a cheque for US$2,000 and the parties also executed and exchanged contracts in the form prescribed. However, a deed tendered by L's attorney was refused by R because the description therein of the premises did not conform to the description in the option, in that the deed described the premises as having a frontage of only 262.54 feet on a certain city street instead of 280.54 feet as called for by the contract description. As a result of this, the payment on the cheque was stopped by R. The New York Supreme Court held that the stopping of the cheque in effect meant that the option had not been exercised by R and that there was no obligation on the part of L to convey the premises to R. However, the Court held that R was entitled to a return of the option money and explained it thus:

> Upon the undisputed facts, the plaintiff Renol, when it rejected the deed, which it had a right to do, was entitled to a return of the option consideration which was to be applied on the purchase price. The defendants could not be permitted to unjustly enrich themselves by keeping the consideration for an option with the terms of which they could not comply.

On these authorities from several US States, it seems to me that US Courts are generally of the opinion that, failure to exercise an option is no ground to refuse damages or to refuse the refund of the option money to the purchaser if the vendor is clearly unable to convey what he has contracted to sell. I find the reasoning in these cases persuasive.

Reverting to the facts of the present case, it is clear that under Clause 7 the defendant has effectively agreed to sell a property which is not to be affected by any road line; that the property in question is so affected by a road line; and that if the plaintiff had exercised the option and asked for the return of all moneys paid, including the option sum, the defendant would have had no defence whatsoever to the claim. There is no doubt that the defendant cannot convey the property which he has undertaken to sell. The plaintiff is not prepared to waive the road-line free requirement. It seems to me the situation is no different from that where the defendant had made it impossible for himself to fulfil his obligations. I see no reason why the plaintiff may not accept the repudiation and sue for the return of the option sum. I am not prepared, and neither do I think it right, to take a strictly technical approach and ignore the essential nature of such an option contract. If the contention of the defendant is correct, it would mean that the plaintiff would have, at one breath, to say that he accepts the option and tenders the remaining 10% of the purchase price and, at the next breath, to ask for the return of the cheque, plus the option sum, which he is entitled to do under Clause 7. This seems to me to be stretching technicality to absurdity. I do not think the law should require a contracting party to do something as futile as this, with the serious consequence that if he should fail to carry out such a futile act it would disentitle him to recover the option sum.

I may add that the concern expressed by the minority Judges in *Fullington* can have no application here. The option here was due to expire at 4 p.m. on 21 July 1987. The plaintiff's solicitors informed the defendant's solicitors at 2.30 p.m. that day that the plaintiff would not buy the property because of the road-line. The situation in *Fullington* was quite different.

Counsel for the defendant maintained that there must be strict compliance with the terms of the option relating to acceptance before the plaintiff could invoke the rights set out therein. He relied on *West Country Cleaners (Falmouth) Ltd. v. Saly* [1966] 3 All ER 210. But I do not think that case is of much assistance. There the tenant was given an option to extend the lease provided "all covenants (therein) contained have been duly observed and performed". The Court of Appeal held that, as the tenant was in breach of the obligation to paint parts of the premises, no matter how trivial that breach might be, he was not entitled to a renewal of the lease. That position is entirely unlike the present case.

There is another case relied on by the defendant as authority for the proposition that option money may not be refunded if option is not exercised. It is a decision from New Zealand: *Sievwright v. Cromwell Proprietary Gold-Mining Co.* [1901] 20 NZLR 487. There the defendant had a tailings claim. On 5 October 1899 the plaintiff, on behalf of a syndicate, made a proposal to the defendant, the material part of which was:

> your company to grant a three months option of the claim to permit of an expert inspecting and reporting on the claim. In the event of a favourable report being received, your company to receive a cash payment of 500 pounds and to be allotted one-sixth of the total shares in any company formed to work the tailings ...

On the same day the company wrote agreeing to the proposal but asked that "100 pounds cash on account of option must be paid down." The plaintiff replied to say that it was unreasonable that the expert would cost 100 pounds. On that note the defendant withdrew any offer it made. A few days later the plaintiff asked the defendant to reconsider the matter. This time the defendant agreed and said "(We) have decided to accept your offer for the tailings dated 5 October, with the addition that they receive 100 pounds cash deposit ..." The plaintiff forwarded a cheque of 100 pounds as deposit and the defendant issued a receipt stating payment "being deposit on account purchase of tailings." Eventually the plaintiff did

not exercise the option as the expert report was unfavourable. The plaintiff asked for the return of the 100 pounds. The Court held that the 100 pounds was the consideration for the option and non-returnable. William J said (at p. 490):

> The plaintiffs have received part of what they bargained for and if they have not received the rest, it is because they did not want it ... If it was intended in any particular event that the money should be repaid the contract should have said so in very clear language.

Now I do not see how one can argue that the facts in *Sievwright* are anywhere near to the present case. It is certainly no authority for the issue before me.

I think I am fortified in the views I have expressed above by the following passage in *Barnsley on Land Options* at p. 92:

> An option to purchase also constitutes an irrevocable offer to sell which the grantor is contractually bound to keep open throughout the agreed period. If during that time he purports to withdraw his offer or actually conveys the land to another, he is in breach of his obligation under the unilateral contract, for which an action in damages lies **without it being necessary for the grantee to exercise the option**. In practice he will almost always disregard the grantor's repudiation, exercise the option and enforce the resulting contract for sale. The point to note is that he is not obliged to take this action; he can accept the repudiation of the option agreement and sue for damages at once.

I would observe that this passage is substantially similar to the views of the two American authors, Corbin and James, which I have quoted above.

Of course I appreciate that Barnsley refers to a situation where the grantor of an option informs the grantee that the grantor would not proceed with the sale or actually conveys the property to another, thus withdrawing the offer in the option. But I am unable to see why the position should be any different if the inability to sell was not caused by the grantor himself but by a third party. From the point of view of the grantee, the result is still the same. The grantor will not be able to convey to the grantee the property described in the option. If there is an impossibility of performance surely the grantee is entitled to accept that fact and accordingly demand the return of the option money.

Besides anticipatory breach, it seems to me that there is another basis upon which the plaintiff may demand the return of the option sum. This is on the ground of implied term, though I must add that neither Counsel has expressly addressed me on this point. I have no doubt that if, at the time of the grant of the option, the plaintiff had asked the defendant this very question (whether, in the circumstances, the plaintiff needs to exercise the option to obtain the refund of the option sum) the defendant would have replied that the plaintiff could have his option sum back without having to go through all the rigmarole. In my view this would be the way in which two reasonably minded persons would have acted.

For the reasons above, I order that the option sum of $5,000 be refunded to the plaintiff. On the facts, it would be grossly unjust to allow the defendant to retain the option sum.

Also found at [1990] 1 CLJ 1269